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No. 14-1516

In the Supreme Court of the United States

STEPHEN DUNCAN, Warden,

PETITIONER,

v.

LAWRENCE OWENS,

RESPONDENT.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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REPLY BRIEF FOR PETITIONER

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ARGUMENT

Respondent is unable to show that the Illinois Appellate Court's affirmance of his conviction was "contrary to, or an unreasonable application of, clearly established" precedent of this Court, as required by 28 U.S.C. § 2254(d)(1) of the Anti-Terrorism and Effective Death Penalty Act (AEDPA). Respondent nonetheless asks this Court to reject that holding. But he barely addresses the reasonableness of the Illinois Appellate Court's conclusion that his rights were not violated, a conclusion that relied on the presumption that the trial judge "considered only competent evidence in reaching his verdict," App. 118a. Instead, he insists on a reading of the trial judge's comments that is not only improbable, but is impermissible under AEDPA. Respondent also reads this Court's precedent at an inappropriately high level of generality, and he relies on cases with factual circumstances vastly different from this case.

Respondent's arguments about harmless error likewise fail, most significantly because he ignores the requirement under *Brecht v. Abrahamson*, 507 U.S. 619 (1993), that he suffer actual prejudice from the alleged error. Respondent also would have this Court violate the requirement that "a determination of a factual issue made by a state court shall be presumed to be correct," 28 U.S.C. § 2254(e)(1). For all these reasons, Respondent's arguments fail, and he is not entitled to habeas relief.

I. Respondent's Claims Rest On An Impermissible and Improbable Reading Of The Record.

Respondent's arguments all rest on the single, indefensible premise that the trial judge's comments

have only one possible reading: "I am not satisfied that the People have proven Respondent's guilt beyond a reasonable doubt with the evidence they have presented because the witnesses did not provide testimony about motive, which is the real issue. So I am going to conclude, even though the People did not provide any evidence of it, that Respondent knew Nelson was dealing drugs. Thus, I find that Respondent had a reason to kill Nelson. I therefore find him guilty." But this reading is impermissible under AEDPA.

What the judge actually said was: "I think all of the witnesses skirted the real issue. The issue to me was you have a seventeen year old youth on a bike who is a drug dealer, who [Respondent] knew he was a drug dealer. [Respondent] wanted to knock him off. I think the State's evidence has proved that fact. Finding of guilty of murder." JA133.

Respondent insists on reading these remarks in the worst possible light, taking every possible inference against the State, rejecting the presumption that judges know and follow the law, and rejecting the Illinois Appellate Court's holdings both that the presumption applied, see App. 118a, and that contrary to Respondent's claim, Resp.Br. 3, 15, no error occurred at all. None of this is permitted on habeas review. 28 U.S.C. §§ 2254(d)(1), 2254(e)(1); see also *Woods v. Donald*, 135 S. Ct. 1372, 1376 (2015) (per curiam) ("When reviewing state criminal convictions [under AEDPA], federal judges are required to afford state courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong."); *Williams v. Illinois*, 132 S. Ct. 2221, 2235 (2012) (plurality opinion) (noting and relying on presumption, under both federal and Illinois law, that

judges know and follow the law); *Renico v. Lett*, 559 U.S. 766, 777-78 (2010) (under AEDPA, deferring to state supreme court's plausible interpretation of trial court's actions, although others were possible).

Respondent is wrong that there is only one way for the judge's remarks to be read. Put most plainly, Respondent presumes that the inference about motive could only have led *to* the verdict, when it is at least as plausible that the inference flowed *from* it. That is, having found him guilty, the judge speculated as to why Respondent killed Nelson, something he would have had no reason to do if he was not convinced of Respondent's guilt. See Pet.Br. 22.

Consider the context. When the judge announced his verdict, it was after hearing the testimony of two eyewitnesses who both repeatedly identified Respondent as the killer. JA26, JA63, JA65, JA68-69, JA81. He heard no testimony to the contrary, and Respondent's trial strategy was to try to cast doubt on the State's witnesses rather than to assert an alternative theory of the case. JA121-22; JA127. In closing argument, both the State and Respondent emphasized that the question in the case was identity, and neither discussed motive. JA110, JA116. In response to the unrebutted eyewitness testimony and the lawyers' emphasis on identity in their arguments, the judge's comment that "the witnesses skirted the real issue" and his speculation about motive, JA133, could easily have meant, for example, that identity was so well-established by the evidence that the only part of the story left untold—that is, the remaining "real issue"—was why Respondent killed Nelson.

And contrary to Respondent's claim, Resp.Br. 2-3, 41-42, there was evidence to support the judge's

statement that "[Respondent] wanted to knock [Nelson] off. I think the State's evidence has proved that fact," JA133. The State's evidence established that Respondent walked up to Nelson and beat him over the head with a baseball bat. That evidence easily established that Respondent wanted to "knock [Nelson] off." Moreover, Respondent admits that the evidence established that Nelson was a drug dealer. Resp.Br. 1. Thus, the only statement the judge made that required a disputable inference was that Respondent knew that Nelson was dealing drugs. And as already explained, that inference likely flowed *from* the verdict, instead of contributing to it.

Contrary to Respondent's claims, the trial judge never said that he did not "credit[]" the "identification testimony," Resp.Br. 40; nor did he express "clear rejection of the eyewitnesses' testimony," Resp.Br. 48. The trial court did not "explicitly bas[e] its guilty verdict on fact-findings of knowledge and motive that absolutely no evidence at trial supported," Resp.Br. 39; it did not say that it found the inferred motive "*outcome-determinative*," Resp.Br. 47 (emphasis in original); it did not " 'affirmatively stat[e] on the record that this manufactured evidence [of motive] constituted the basis of its verdict,' " Resp.Br. 4 (quoting Illinois Appellate Court dissent, App. 128a); it did not "state[] on the record that it was finding the defendant guilty based on key facts that had no support in the trial record," Resp.Br. 2; and it did not "explain[] that its reason for finding [the] defendant guilty rests on facts supported nowhere in the trial record," Resp.Br. 34. No matter how many times Respondent asserts otherwise, it is *not* an "indisputable fact that the trial court based its guilty verdict on facts with no evidentiary basis," Resp.Br. 32.

Thus, Respondent's arguments depend on asserting his own inferences—that the trial judge did not think the evidence was sufficient and that he would not have found Respondent guilty if he had not inferred a motive— as if they were fact. But repeating them does not make them so. Because Respondent's reading of the judge's remarks takes every inference against the State, assumes that the judge deliberately convicted him lawlessly, and rejects the Illinois Appellate Court's contrary conclusion that he followed the law, it is impermissible. And all of Respondent's legal arguments flow from that flawed reading.

II. No Clearly Established Precedent Supports Respondent's Claims.

As explained in Part I, Respondent posits an impermissible and improbable interpretation of the trial judge's remarks in an attempt to make his claim fit into the scope of clearly established precedent. When the judge's actual remarks are considered, however, it becomes obvious that no clearly established precedent reaches this case. This Court has never held that a defendant's due process rights are violated when a finder of fact infers a fact not directly established by the record evidence, unless (1) some improper outside information or circumstance could have prejudicially influenced the verdict, or (2) the record evidence is insufficient to support the elements of the crime. And neither of these circumstances is present here. Nor has this Court ever held that a factfinder's inference of a fact that is not an element can violate due process. For these reasons alone, Respondent's habeas claim fails.

Respondent also stretches the scope of such precedent by cherry-picking language from this Court's decisions without regard to legal or factual context. He

thus ignores the admonition against "fram[ing] the issue at too high a level of generality" in discussing whether there is clearly established precedent that can support habeas relief. *Donald*, 135 S. Ct. at 1377; see also *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014) (per curiam) ("caution[ing] the lower courts . . . against 'framing our precedents at such a high level of generality' ") (quoting *Nevada v. Jackson*, 133 S. Ct. 1990, 1994 (2013) (per curiam)).

This warning against articulating an overbroad rule is particularly apt when a habeas petitioner alleges a general violation of his due process rights. After all, this Court's precedent clearly establishes the general rule that all defendants have a right to a fair trial. See, *e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 46 (1975) ("[A] fair trial in a fair tribunal is a basic requirement of due process.") (internal quotation marks and citations omitted). But such precedent does not mean that every unfair trial allegation necessarily invokes a clearly established precedent for purposes of AEDPA. To the contrary, this Court has rejected claims alleging a denial of a fair trial in violation of due process on the grounds that there was no clearly established law on point. See, *e.g.*, *Carey v. Musladin*, 549 U.S. 70, 72 (2006) (due to absence of clearly established precedent, denying habeas petitioner's claim of unfair trial); *cf. Anderson v. Creighton*, 483 U.S. 635, 639 (1987) ("[T]he right to due process of law is quite clearly established by the Due Process Clause, and thus there is a sense in which any action that violates that Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right" for purposes of qualified immunity).

Similarly, here, the general rule Respondent points to—that a defendant has a right to be convicted based on the evidence adduced at trial—is "far too abstract to clearly establish the specific rule [R]espondent needs," *Smith*, 135 S. Ct. at 4, which is that a trial judge's inferences about a non-element fact can violate due process.

A. None of Respondent's cases clearly establish the rule he needs.

The cases on which Respondent relies, see Resp.Br. 25-28, share two common, dispositive distinctions from this case: (1) the finder of fact was exposed to possibly prejudicial outside information or circumstances, and (2) the finder of fact was a jury, not a judge. These differences preclude those cases from clearly establishing the constitutional rule Respondent needs to obtain habeas relief.

In *Taylor v. Kentucky*, 436 U.S. 478 (1978), for example, this Court held that a defendant's right to a fair trial was violated where the prosecution invited the jury to infer his guilt from the fact that he had been arrested and indicted and where the court provided inadequate instructions regarding the State's burden of proof. 436 U.S. at 485-88. The State repeatedly invited the jury to consider Taylor's status as a criminal defendant as evidence of guilt, thus creating a "genuine danger" that the jury would convict him based on this circumstance, which is not even admissible as evidence. *Id.* at 487-88. It was in that context that this Court explained "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on * * * circumstances not adduced as proof at trial." *Id.* at 485. Those

"circumstances not adduced as proof at trial," however, were actual statements made to the jury. Here, in contrast, Respondent can point to no such improper statements. See Pet.Br. 17 (discussing *Taylor*).

Turner v. Louisiana, 379 U.S. 466 (1965), is equally inapposite. There, this Court held that a defendant's due process rights were violated when two sheriff's deputies who had provided key testimony for the State had charge of the jury outside the courtroom for the three-day trial. *Id.* at 473-74. The risk of prejudice in that context—the possibility that the jury would learn information from the deputies outside the courtroom, for example—was too great, and so a new trial was necessary. *Ibid.* Respondent, however, has alleged no potentially prejudicial influence on his trial judge.

Likewise, in *Irvin v. Dowd*, 366 U.S. 717, 724-29 (1961), this Court held that a defendant's due process rights were violated where pretrial media coverage engendered deep and bitter prejudice throughout the community. See also *Sheppard v. Maxwell*, 384 U.S. 333, 354-55 (1966) (holding due process was violated by the extent and nature of trial publicity and media conduct); *Estelle v. Williams*, 425 U.S. 501, 512 (1976) (holding right to fair trial potentially violated where defendant compelled to appear before jury in prison attire, but no violation occurred because defendant failed to object); *Holbrook v. Flynn*, 475 U.S. 560, 572 (1986) (holding right to fair trial not violated by presence of additional, uniformed security personnel in courtroom). No such risk of outside information or influences was present at Respondent's trial. Thus, these cases cannot provide the necessary clearly established precedent to warrant relief. See *White v. Woodall*, 134 S. Ct. 1697, 1706 (2014) ("Section

2254(d)(1) * * * does not require state courts to *extend* [Supreme Court] precedent or license federal courts to treat the failure to do so as error.") (emphasis in original).

Moreover, all of these cases considered an improper outside influence in a jury trial. But Respondent waived his right to a jury, JA6, and judges are presumed less susceptible to improper influences than juries, see *Williams v. Illinois*, 132 S. Ct. at 2235 (noting presumption). Respondent, however, makes no attempt to address this distinction between the cases he relies on and his own circumstance, illustrating that these cases do not provide the requisite clearly established precedent.

Respondent correctly notes that a habeas petitioner need not show that this Court has previously decided a case with nearly identical facts. Resp. Br. 33. But here, where no outside influence potentially affected the finder of fact's verdict, and the trier of fact was a judge, not a jury, Respondent cannot satisfy § 2254(d)(1)'s narrow requirement that "it is so obvious that a clearly established rule applies to a given set of facts that there could be no 'fairminded disagreement' on the question." *Woodall*, 134 S. Ct. at 1706-07 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)). Indeed, even if it would be reasonable to extend the clearly established precedent to respondent's claim, or unreasonable not to, the fact that such an extension would be necessary means Respondent's claim must fail on habeas review. *Id.* at 1706.

B. No other clearly established rule, as announced by this Court, applies to Respondent's claim.

A second type of due process violation that Respondent hints at it is based on the requirement that the evidence be sufficient to establish every element of a crime beyond a reasonable doubt. See, *e.g.*, *In re Winship*, 397 U.S. 358, 364 (1970); *Jackson v. Virginia*, 443 U.S. 307, 315-16 (1979). But Respondent does not argue that the evidence was insufficient with respect to any element of his crime of murder, and any such argument would be frivolous. Two eyewitnesses testified that they saw Respondent beat Nelson over the head with a bat, so there was evidence to support every element of first degree murder—that Respondent killed Nelson, and that either he intended to kill or do great bodily harm, or he knew that his acts would cause, or had a strong probability of causing, death or great bodily harm. See 720 ILCS 5/9-1(a) (1998) (defining elements of first degree murder); Pet.Br. 23 (discussing elements). Indeed, even the Seventh Circuit acknowledged that the evidence was sufficient to sustain a convcition. App. 4a.

Moreover, convictions requiring extra-evidentiary inferences, such as inferences based on common sense and experience, are regularly upheld. See, *e.g.*, *Barnes v. United States*, 412 U.S. 837, 844-45 (1973) (unexplained possession of stolen goods sufficient evidence from which jury could infer that defendant knew goods were stolen); *Coleman v. Johnson*, 132 S. Ct. 2060, 2065 (2012) (per curiam) (jury could infer requisite knowledge and intent from actions of defendant and co-defendant). And if such inferences are permissible to support finding an element of a crime, as in *Barnes* and *Johnson*, then they are

certainly permissible to support a factual conclusion about a non-element, as in this case. In any event, Respondent has long since forfeited any sufficiency-of-the-evidence claim. See Pet.Br. 23-24.

Respondent unsuccessfully invokes other due process principles. He argues, for example, that because there was no direct evidence of his knowledge of Nelson's drug dealing, he was deprived of an opportunity to "confront or cross-examine on those facts." Resp.Br. 29. But this argument boils down to a claim that it violates due process for a finder of fact to convict on the basis of a theory of the case different from that urged by the State, or even to make inferences based on its own common sense and experience if the defendant has no opportunity to counter them. There is no basis in law for such a claim, and a defendant is not entitled to inquire into the factfinder's thought processes, even (unlike here) where a judge has issued a verdict that is logically inconsistent. See *Harris v. Rivera*, 454 U.S. 339, 344-48 (1981); see also *Amici* Br. 11. The due process backstop to convictions based on unreasonable inferences is review for sufficiency of the evidence, not an inquiry into or speculation about the mental processes of the finder of fact. *United States v. Powell*, 469 U.S. 57, 67 (1984).

Respondent's invocation of the presumption of innocence likewise fails. See Resp.Br. 26-27, 41-42. These arguments rest squarely on Respondent's faulty representation of the facts. Contrary to Respondent's suggestions, the judge did not state that the evidence was insufficient but that he was going to find the defendant guilty anyway. See *supra*, Part I.

Nor is Respondent correct that Petitioner's position means that even a "flagrant" constitutional violation would be immune from habeas relief if no comparable facts had previously been addressed by this Court. Resp.Br. 34. To the contrary, if a trial judge at a bench trial were to announce, for example, that he was finding the defendant guilty only because he had previously presided over a trial in which the defendant's brother had been convicted of a similar crime, that would be a violation of the clearly established precedent of *Taylor* and *Turner* because the factfinder would be relying on extra-evidentiary information. But there is no such "flagrant" violation here. Only by positing an interpretation of the record that is both implausible and impermissible can defendant even begin to suggest that he is entitled to relief.

Finally, Respondent makes the puzzling argument that Petitioner's reliance on this Court's decisions is misplaced because "not a single case denies habeas relief with a fact scenario that squarely violates a constitutional right," and because the Court's per curiam decisions "generally involve facts that simply do not qualify as constitutional violations." Resp.Br. 36. This argument is both circular and factually incorrect. First, if "a fact scenario" did "squarely violate[] a constitutional right" the case would involve clearly established precedent that would justify relief. The cases denying relief do not involve a square violation of a constitutional right because cases denying relief, by definition, do not involve a violation or misapplication of clearly established precedent. Respondent's argument is, in that regard, entirely circular.

Second, habeas relief cannot be granted under AEDPA even where a constitutional violation may have occurred but where no clearly established precedent of this Court has addressed that violation. Habeas decisions therefore often do not even address the underlying question of *whether* a violation occurred, so it is not possible to say that the cases "generally involve facts that simply do not qualify as constitutional violations," Resp.Br. 6. The Court emphasized that distinction in *Marshall v. Rodgers*, 133 S. Ct. 1446 (2013) (per curiam), one of the cases on which Respondent relies. See Resp.Br. 36. In *Rodgers*, the Court, finding no clearly established Supreme Court precedent on point, rejected habeas relief for a petitioner who had requested appointment of counsel for help with a post-trial motion when he had previously waived representation. *Id.* at 1447-48. Contrary to Respondent's suggestion, Resp.Br. 36, the Court did not even hint that there was no underlying violation. Rather, it "expresse[d] no view on the merits of the underlying Sixth Amendment principle * * * And it [did] not suggest or imply that the underlying issue, if presented on direct review, would be insubstantial." 133 S. Ct. at 1451.

Musladin, 549 U.S. 70, which Respondent discusses, Resp.Br. 38-39, is another good example. There, this Court held that precedent involving state action at a trial did not clearly establish that *spectator* conduct—in *Musladin*, wearing buttons with a picture of the victim's face—could violate a defendant's due process rights. 549 U.S. at 77. But this Court did not decide that such conduct would never violate due process. In fact, Justice Kennedy, concurring in the judgment, called for consideration of whether "as a preventive measure, or as a general rule to preserve

the calm and dignity of a court," such buttons should be "prohibited as a matter of course." *Id.* at 81 (Kennedy, J., concurring in judgment). He emphasized, however, that such a rule would be "new" and thus could not "be grounds for relief in the procedural posture of this case." *Ibid.*

* * *

Where, as here, no clearly established Supreme Court precedent supports Respondent's claim, habeas relief is unavailable.

III. The Illinois Appellate Court's Holding That The Trial Judge Relied Solely On Competent Trial Evidence To Find Respondent Guilty Of Murder Was Not Objectively Unreasonable.

Respondent claims that his conviction violated his due process right to be convicted based solely on the evidence at trial. Resp. Br. 21-22. Even if Respondent were correct that this general principle constitutes clearly established federal law that could apply to his claim, he is still not entitled to relief. The Illinois Appellate Court denied Respondent's claim on the merits. Although Respondent insists that the Illinois Appellate Court held that the trial judge committed error, Resp.Br, 3, 15, in fact, that court explicitly held the opposite: "Nevertheless, despite the trial judge's comments, in a bench trial, it is presumed that the trial judge considered only competent evidence in reaching his verdict." App. 118a. And there was no error if only competent evidence was considered.

Because the Illinois Appellate Court decided the case on the merits, the highly deferential AEDPA standard applies, and Respondent must show that "the earlier state court's decision 'was contrary to' federal

law then clearly established in the holdings of this Court * * * or that it 'involved an unreasonable application' of such law." *Richter*, 562 U.S. at 100 (quoting 28 U.S.C. § 2254(d)(1); other citation omitted). Respondent cannot meet that burden here because it was not "objectively unreasonable," *Williams v. Taylor*, 529 U.S. 362, 409 (2000), for the Illinois Appellate Court to reject Respondent's claim on the merits.

The Illinois Appellate Court relied on the presumption "that the trial judge considered only competent evidence in reaching his verdict." App. at 118a.[1] The presumption that judges know and follow the law is not unique to Illinois. See *Williams v. Illinois*, 132 S. Ct. at 2235; *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002). And it is particularly appropriate on federal habeas review. See *Visciotti*, 537 U.S. at 24 (noting "presumption that state courts know and follow the law" and "§ 2254(d)'s highly deferential standard for evaluating state-court rulings, * * * which demands that state-court decisions be given the benefit of the doubt") (internal quotation marks and citations omitted). As this Court recently explained, "[w]hen reviewing state criminal convictions on collateral review, federal judges are required to afford state

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[1] Respondent makes much of the fact that the court in *People v. Worlds*, 400 N.E.2d 85, 86-87 (Ill. App. 1980), found the presumption rebutted where the judge in a bench trial elicited information about the defendants' criminal records at the beginning of the trial. Resp.Br. 31. But the Illinois Appellate Court's citation of *Worlds*, coupled with the fact that the use of the presumption was one of the dissent's express points of disagreement, App. 128a, indicates that the court did not apply the presumption unthinkingly.

courts due respect by overturning their decisions only when there could be no reasonable dispute that they were wrong." *Donald*, 135 S. Ct. at 1376; see also, *e.g.*, *White v. Wheeler*, 136 S. Ct. 456, 460 (2015) (per curiam) (where state reviewing court owes deference to trial court, and federal court owes deference to state reviewing court under AEDPA, federal habeas review must be "doubly deferential").

Here, it was not objectively unreasonable to conclude that the trial judge relied only on the trial evidence to convict Respondent. He was presented with not one, but two, eyewitnesses who had repeatedly identified Respondent as Nelson's killer both before and during the trial, as well as Respondent's own flight from police when stopped for a traffic violation. Nor did the trial court engage in any speculation regarding why Respondent might have wanted this drug dealer dead (such as a battle for territory or a dispute over money or drugs). That is, the trial court did not say, "I'm not sure who killed Ramon Nelson, but Respondent had a reason to, so it was probably him." Rather, after the State proved the identity of the killer, the trial court inferred the one part of the story left untold: why Respondent committed the murder.

Respondent's discussion of *House v. Bell*, 547 U.S. 518 (2006), Resp.Br. at 40-41, is thus inapposite. Respondent points out correctly that although motive is not an element of the crime of murder, *House* shows that motive can be important evidence in establishing the identity of the killer. But in *House*, the State presented only circumstantial evidence and relied in closing argument on the defendant's motive to establish his identity as the killer. 547 U.S. at 540. In contrast, here, the State presented unrebutted eyewitnesses who identified Respondent as the killer,

and offered no evidence of motive at all. So, while the identity of the killer was central to both cases—as it is to many, if not most, murder cases—here, unlike in *House*, the State established identity directly and did not need to rely on motive evidence.[2]

To be sure, the Illinois Appellate Court admonished the trial judge that it would have been advisable for him to explain his credibility assessments and other findings. App. 120a. But Respondent points to, and Petitioner is aware of, no state law requiring the trial court to do so, much less a clearly established federal constitutional requirement. *Cf. Rivera*, 454 U.S. at 348 (holding there is no federal constitutional requirement that state trial judge in bench trial provide explanation for inconsistent verdicts). The Illinois Appellate Court's statement that the trial court's speculation "will be construed as harmless error," App. 120a, appearing in the same paragraph of the opinion as the admonishment, was not a holding that constitutional error occurred. *Contra* Resp.Br. at 3-4. And the trial judge's failure to articulate specific credibility determinations and factual findings from the trial evidence does not make it objectively unreasonable to apply the presumption that he, nevertheless, relied on that evidence to reach his verdict. For these reasons, respondent's additional suggestion that the Illinois Appellate Court had a constitutional obligation to remand the case to the trial court with instructions to articulate its credibility

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[2] *People v. Smith*, 565 N.E.2d 900, 906 (Ill. 1990), on which Respondent also relies, is similarly distinguishable because there, unlike here, "the State undert[ook] to prove facts which the State assert[ed] constitute[d] a motive for the crime charged."

determinations regarding the State's witnesses, Resp.Br. 52, is misplaced.

It is presumed that judges consider only competent evidence in reaching their verdicts, See *Williams v. Illinois*, 132 S. Ct. at 2235; *Visciotti*, 537 U.S. at 24, and the record here supports the application of that presumption. Therefore, it was not objectively unreasonable for the Illinois Appellate Court to reject Respondent's due process claim. Respondent cannot show that the demanding standard of § 2254(d)(1) has been met, and he is not entitled to habeas relief.

IV. Even If An Error Occurred, It Did Not Cause Actual Prejudice to Respondent.

Respondent's arguments that the alleged error was not harmless suffer from several significant defects. Notably, he betrays a fundamental misunderstanding of harmless error analysis on habeas review. Unlike on direct appeal, on habeas review, the State need not prove that a constitutional error was harmless beyond a reasonable doubt. See *Chapman v. California*, 386 U.S. 18 (1967). Rather, "habeas petitioners 'are not entitled to habeas relief based on trial error unless they can establish that it resulted in actual prejudice.' " *Davis v. Ayala*, 135 S. Ct. 2187, 2197 (2015) (quoting *Brecht*, 507 U.S. at 637).

Instead of attempting to establish this prejudice, Respondent critiques the Illinois Appellate Court's *reasoning* when it applied *Chapman*. Resp.Br. 45-48. But that critique is irrelevant. The relevant question related to *Chapman* on habeas review is whether the state court's *conclusion* was "'so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of

fairminded disagreement,' " *Ayala*, 135 S. Ct. at 2199 (quoting *Richter*, 562 U.S. at103). The state court's reasoning is not what is under review.

More importantly, the petitioner must meet the even more daunting *Brecht* standard. See *Ayala*, 135 S. Ct. at 2199 ("a prisoner who seeks habeas corpus relief must satisfy *Brecht*"); see also *id.* at 2211 (Sotomayor, J., dissenting) (agreeing that *Brecht* applies on federal habeas review). And *Brecht* applies even when the state court did not apply *Chapman* at all. *Fry v. Pliler*, 551 U.S. 112, 121-22 (2007). Respondent, however, makes little effort to show that he meets *Brecht*'s requirement of "actual prejudice." 507 U.S. at 637

Respondent does not, and cannot, demonstrate that the trial court's speculation that Respondent knew Nelson was a drug dealer, even if improper, had a "substantial and injurious effect on his verdict." *Ayala*, 135 S. Ct. at 2197-98 (quoting *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995)). More likely, and as already explained, it had no effect at all on the verdict. Instead, the trial court's speculation as to motive followed *from* the trial court's conclusion, based on evidence, that Respondent killed Nelson.

Respondent argues that "the trial court had many good reasons in the trial record *not* to credit the State's eyewitnesses," Resp.Br. 52 (emphasis in original), and reviews their testimony as if his brief were a closing argument at trial. But that the witnesses were imperfect and the judge was not compelled to believe them does not establish "actual prejudice." Respondent's claim here is that because the judge did not fully explain his reasoning and credibility determinations, the federal courts must presume the worst. Such speculation cannot substitute for *Brecht*'s

requirement that Respondent suffer actual prejudice, and it is inappropriate on habeas review.

Respondent also relies on *Sullivan v. Louisiana*, 508 U.S. 275 (1993), to suggest that the trial court's verdict without explicit credibility determinations and the Illinois Appellate Court's subsequent review for harmless error undermine both the jury's role and the presumption of innocence, Resp.Br. 50. But *Sullivan* is inapposite. *Sullivan* protects a right that Respondent has long since waived, see JA6—the Sixth Amendment right to have a jury find him guilty beyond a reasonable doubt. 508 U.S. at 277-78. In *Sullivan*, the jury received incorrect instructions about the State's burden of proof, which this Court held constitutes structural error to which harmless error analysis does not apply. *Id.* at 281-82. In a case in which there is no jury, *Sullivan* is not relevant.

Respondent certainly retained his due process right to be found guilty beyond a reasonable doubt by the judge. *Jackson*, 443 U.S. at 317. But he does not claim that the judge was unaware of or did not understand the State's burden of proof. So even if *Sullivan* had some relevance for bench trials, it would not apply here.

And Respondent is wrong when he implies that by reviewing the trial evidence, including considering whether Johnnie's testimony was reliable, the Illinois Appellate Court usurped the factfinder's function. Resp.Br. 50-51. Were this argument correct, it would render harmless error review meaningless. In the absence of structural error, as in *Sullivan*, there is nothing inappropriate about the appellate court evaluating the evidence for its reliability when engaging in harmless error analysis. See *Yates v.*

Evatt, 500 U.S. 391, 404 (1991) (overruled on other grounds by *Estelle v. McGuire*, 502 U.S. 62, 72 n.4 (1991) (appellate court must weigh probative force of evidence against probative force of error standing alone).

Moreover, this Court and others have long recognized that a state appellate court can resolve a question of fact, or, as AEDPA puts it, make "a determination of a factual issue," 28 U.S.C. § 2254(e)(1). See, *e.g.*, *Sumner v. Mata*, 449 U.S. 539, 545-46 (1981) (pre-AEDPA case); *Clements v. Clarke*, 592 F.3d 45, 47 (1st Cir. 2010); *Mendiola v. Schomig*, 224 F.3d 589, 592-93 (7th Cir. 2000). And AEDPA explicitly provides that such a determination "shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Thus, the Illinois Appellate Court's review of the evidence was not only unremarkable as part of harmless error analysis but it is entitled to deference on federal habeas review.

Contrary to Respondent's assertion, Petitioner is not conflating AEDPA's standards under § 2254(d)(1), § 2254(d)(2), and § 2254(e)(1). Petitioner does not claim that § 2254(e)(1) applies to the state appellate court's legal conclusion that any error was harmless; rather it applies to that court's fact-based determination that Johnnie's testimony was reliable. See App. 117a, 119a-122a (citing and applying *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)); *Sumner*, 449 U.S. at 542 (reviewing state appellate court factual determinations about identification process); *id.* at 546-47 (insisting on deference to those factual determinations). The evaluation of the legal conclusion of harmless error, which as already explained, relies on *Brecht*, must be made in light of this factual determination by the

Illinois Appellate Court. 28 U.S.C. § 2254(e)(1); see also *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005)

Finally, Respondent incorrectly claims that Petitioner has waived reliance on § 2254(e)(1). Section 2254(e)(1) is as relevant to *this* Court's analysis of this case as it was to the Seventh Circuit's. This Court must itself properly apply AEDPA, and for this reason, the appropriate application of § 2254(e)(1) is fairly included in the Question Presented. See *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980) (Where "determination of [a]question is essential to the correct disposition of the other issues in the case, we shall treat it as 'fairly comprised' by the questions presented in the petition for certiorari.").

* * *

Respondent cannot establish that he suffered actual prejudice from the error he alleges. For that reason alone, he cannot obtain habeas relief.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

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